U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: February 7, 2002

BALCA Case No.: 2001-INA-77
ETA Case No.: P1997-CA-09057197/ML

In the Matter of:

DOWNING FLOOR COVERING,
Employer,

on behalf of

MARIO IBARRA RICO,
Alien

Appearances: John C. Montano, Esq.

Certifying Officer: Armando Quiroz
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from an application for labor certification filed by a tile/floor covering installation company for the position of Tile Setter. (AF 12-13).[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On April 25, 1996, Downing Floor Covering, filed an application for alien employment certification on behalf of the Alien, Mario Rico, to fill the position of Tile Setter. Minimum requirements for the position were listed as two years experience in the job offered.

[1] "AF" is an abbreviation for "Appeal File."

Employer received seven applicant referrals in response to its recruitment efforts, two of whom were rejected as unqualified for the position and five as unavailable for the position.[2] (AF 28-69).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on August 22, 2000, questioning Employer's good faith recruitment effort in the contact and consideration of six U.S. worker applicants. (AF 8-10). The CO questioned the timeliness of contact and the fact that there was no evidence Employer had tried to reach these applicants by telephone.

In Rebuttal, Employer stated that the resumes were received on November 19 and 21 and certified letters, return receipt requested, sent scheduling interviews for December 7. Employer reported that only two of the seven applicants appeared for their scheduled interview and they were disqualified because they did not posses the required experience for the job offer. Employer further stated that each of the other applicants received and signed for the letter of invitation to interview, but then failed to either appear for the interview or contact Employer to reschedule as was clearly requested in the letter. Employer stressed that the letter "clearly referenced the position for which the applicant applied in bold lettering with the job title and job number as it appeared in the newspaper advertisement". Employer also reported that he attempted to reach by telephone each applicant who failed to appear, as was previously detailed in his recruitment report. (AF 5-6).

A Final Determination denying labor certification was issued by the CO on November 7, 2000, based upon a finding that Employer had shown insufficient recruitment effort. (AF 3-4). In support thereof, the CO cited Employer's failure to provide additional evidence of timely effort to contact qualified U.S. applicants, that Employer's interview letter contained no telephone number for contact and that the letter was received after the interview date.

Employer filed a Request for Review on December 11, 2000. (AF 1-2). The matter was docketed in this office on April 20, 2001.

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(6), an employer is required to document that if U.S. workers applied for the job opportunity, they were rejected solely for lawful, job-related reasons. Section 656.20(c)(8) requires that the job opportunity be clearly open to any qualified U.S. worker. Implicit in the regulations is a requirement of good faith recruitment. *H.C. LaMarche Ent. Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions by the employer which indicate a lack of good faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are thus a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient United States workers who are "able, willing, qualified and

2 Employer reported having contacted, interviewed and found two of the applicants unqualified and documented having sent interview invitation letters via certified mail to the remaining five applicants.

available" to perform the work. 20 C.F.R. § 656.1

In the instant case, the CO challenged Employer's good faith in the recruitment of U.S. workers. The burden of proof is on an employer in an alien labor certification. 20 C.F.R. § 656.2; *Universal Diesel Services,* 1994-INA-250 (Oct. 7, 1995). Thus, it is Employer's burden to demonstrate good faith in recruitment and to show that U.S. workers are not able, willing qualified or available for this job opportunity.

The Board in *M.N. Auto Electric Corp.*, 2000-INA-165 (Aug. 8, 2001)(*en banc*), recently held that in order to establish good faith recruitment, an employer does not need to establish actual contact of applicants but only reasonable efforts to contact applicants.[3] What constitutes a reasonable effort to contact a qualified U.S. applicant depends on the facts of the particular of the case. As cited to by the Board in *M.N. Auto,* in some circumstances reasonable effort requires more than a single type of attempted contact. *Yaron Development Co., Inc.,* 1989-INA-178 (Apr. 19, 1991)(*en banc*).

In the instant case, Employer received five applicant referrals under cover letter of November 19 and two additional referrals under cover letter of November 21 and was instructed to contact the applicants within 14 calendar days. (AF 39-41, 67-69). Employer's recruitment documentation reflects that Employer sent interview letters by certified mail, return receipt requested, on November 25, 1996. The documentation further reflects that three of the applicants signed for and hence, received their letters prior to the scheduled interview date of December 7, (AF 48, 56, 61), that three of the applicants did not sign for or receive the letter until after the interview date, (AF 35, 43, 64), and that one interview letter was not signed for. (AF 65). Applicants Campagne and Halub were interviewed and found unqualified for the job. Applicant Wade signed for the letter on November 29 but neither appeared for the interview nor contacted Employer to reschedule. Applicant Gibb signed for the letter on December 13 and Employer reported leaving messages for him without response on December 23 and 24. Applicant Lowe signed for the letter on December 18 and Employer indicated several messages were left on the applicant's answering machine without response, but did not specify the dates. Applicant Caughey signed for the letter on December 24 and Employer reported leaving messages for him without response on December 23 and 24. Applicant Austin's return receipt was returned unsigned, but Employer reported that he was contacted by phone on December 23 and rescheduled for an interview on December 26 at 9:00 a.m. for which he didn't show.

The records reflects that Employer promptly sent certified letters to interview within three to

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3The Board further held that a CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants, but rather that an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith. The Board held that a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants, but advised employers to be cognizant that although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan 13, 1988)(*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

five days of receipt of the applicant referrals. Letters were sent on November 25 scheduling interviews for December 7. Nonetheless, the CO observed that only two of the seven applicants had appeared for the interview. The Board in *M.N. Auto Electric, supra,* noted that since actual contact is not required, evidence of timely mailing to numerous applicants of a letter which does not tend to discourage or contain onerous requirements and allows sufficient time for U.S. applicants to attend an interview may constitute a reasonable effort **where there is a significant response to the letter**.(emphasis added). *Citing H.S. LaMarche, Ent. Inc.,* 1987-INA-607 (Oct. 27, 1988); *Gem Sound Corp.,* 1989-INA-290 (Oct. 29, 1990); *cf., Bada Apparel,* 1987-INA-712 (April l3, 1988). Here, only two of the applicants sent interview letters appeared for the interview. The Board previously has held that where certified letters were sent to nine U.S. applicants and none responded, a reasonable effort required more than that single attempt. *Sierra Canyon School,* 1990-INA-410 (Jan. 16, 1992); *see also Johnny air Cargo,* 1997-INA-123 (Mar. 4, 1998); *Therapy Connection,* 1993-INA-129 (June 30, 1994). We similarly conclude in the instant case that a response from only two out of seven applicants is an inadequate response warranting more than a single attempt.

Employer in fact reportedly made a second attempt at contact of all but one of the applicants, however, once December 7 had passed, Employer reports having waited in excess of two weeks before making an additional effort at contact. Presumably, when presented with seemingly qualified U.S. applicants, an employer who has a *bona fide* opening it desires to fill would, in exercise of good faith, contact these workers as soon as possible. By introducing an unwarranted delay, doubt is cast upon whether the position is clearly open to U.S. workers. *M.N. Auto Electric, citing Creative Cabinet & Store Fixture, Co.,* 1989-INA-181 (Jan. 24, 1990)(*en banc*). Once December 7 had passed and Employer knew he had insufficient response to his interview letter, Employer fails to explain why a follow-up contact effort was not made. It was not until 16 days later, December 23 and 24, two days before Christmas and in the middle of the holiday season, that Employer reports its first attempts at contact by phone. This, despite the fact that the certified return receipts reflect that all but three of the letters were received after the interview date. As presented, we find Employer's evidence unpersuasive and conclude that Employer has not adequately documented a timely good faith effort at recruitment of U.S. workers for the petitioned position. On this basis, it is determined that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.